BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CURTIS GOTTMAN and LILA GOTTMAN,
Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2011-054

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Lila Gottman and Curtis Gottman, Canby, filed the petition for review and argued on their own behalf.

Scott Ciecko, Assistant County Counsel, Oregon City, filed the response brief on behalf of the respondent. Rhett Tatum, Assistant County Counsel, Oregon City, argued on behalf of respondent.

HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board Member, participated in the decision.

AFFIRMED 12/09/2011

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county hearings officer's decision affirming a county planning director's decision that denied their request for approval of an existing paintball facility on their property.

INTRODUCTION

Petitioners assert a number of legal theories in support of their request for county approval to authorize continued operation of a commercial paintball park on their EFU-zoned property. Those legal theories rely in part on existing land use law and in part on Measure 37 waivers and a Measure 49 order.[1] Petitioners' legal theories overlap somewhat and are difficult to understand without some understanding of the complicated history of petitioners' development of their property and their efforts to seek approval for the disputed paintball park. We therefore set out a chronology below before summarizing petitioners' legal theories and then turn to their assignments of error.

A. Acquisition of Property and Development of the Paintball Park

April 28, 1978	Petitioner Curtis Gottman acquired the subject 72-acre property at a time when there were no applicable county land use regulations. Petitioner Lila Gottman subsequently became part owner.
August 23, 1979	The subject property was first zoned General Agricultural District and later became zoned for Exclusive Farm Use (EFU). Under the EFU zone,

[1] Ballot Measure 37 authorized property owners to request waivers of state and local land use laws if the property owner acquired the property before the land use laws were enacted and the land use laws reduced the fair market value of the property. Property owners who were granted Measure 37 waivers were allowed to seek approval of development that would not otherwise be allowed under the waived land use laws. With one exception, on December 6, 2007, Measure 49 replaced any rights a property owner may have been granted under a Measure 37 waiver with a new system of compensation under which the property owner could be authorized to construct dwellings on the property that would not otherwise be allowed under applicable land use laws. The one exception specified in Measure 49 is where the property owner can establish that he or she received a Measure 37 waiver before December 6, 2007 and had "a common law vested right [on December 6, 2007] to complete and continue the use described in the waiver." Or Laws 2007, ch 424, sec 5(3).

	private parks are conditionally allowed, but are not allowed on property that is predominantly High Value Farmland. One of the issues in this appeal is whether the subject property is predominantly High Value Farmland.
December 2, 2004	Measure 37 is enacted and takes effect.
Beginning in 2005	The Gottmans begin developing a paintball park on a part of their property. This conversion process has continued over many years and there has been a long running dispute between petitioners and the county over the legality of the paintball park.

B. Ballot Measure 37 Waivers, Measure 49 Order, Vested Rights Determinations

August 2, 2006	County EFU zoning does not allow a private park on EFU-zoned, High Value Farmland. The county granted petitioners a Measure 37 waiver of county EFU zoning. Record 137-40.
September 26, 2006	DLCD granted petitioners a Measure 37 waiver of state laws limiting development of agricultural land, to permit development of a 13 lot subdivision and a dwelling on each of the newly created lots. The state's Measure 37 waiver makes no mention of a paintball park. Record 123-34.
November 6, 2007	DLCD granted petitioners a second Measure 37 waiver for continued operation of a paintball park, notwithstanding that private parks are not allowed on a property that is predominantly High Value Farmland under state law. Record 107-118.
December 6, 2007	One month after DLCD grants its second Measure 37 waiver, Ballot Measure 49 takes effect.
August 25, 2008	Petitioners seek a determination from the county that they have a common law vested right, pursuant to Measure 49, to complete and continue operation of their paintball park. *See* n 1.
October 23, 2008	The county planning director denied petitioners' application for a vested rights determination because most of the paintball park construction expenditures predated the Measure 37 waivers and for that reason

	could not be counted in determining whether petitioners' expenditures to construct the use are sufficiently substantial under the ratio of expenditures factor in *Clackamas County v. Holmes*, 265 Or 193, 508 P2d 190 (1973).[2] The planning director also found that petitioners did not secure a county permit that was required for such construction. Supplemental Record 34-41.
October 31, 2008	Petitioners appeal the planning director's vested rights determination to the county hearings officer.
March 20, 2010	The county hearings officer concluded that petitioners do not have a vested right to complete and continue their paintball park. Among other things, in applying the *Holmes* ratio of expenditures test, the hearings officer also concludes that expenditures toward construction of the paintball park that could be considered under *Holmes* were not substantial. Of the claimed $88,818 total development costs, the hearings officer found only $31,055 could be attributed to development of the property as a paintball park and of that amount only the expenditures that were made after the county's August 2, 2006 Measure 37 waiver and before Measure 49 took effect on December 6, 2007 could be considered. The hearings officer concluded that that amount was $10,900 and the hearings officer found she was unable to conclude that that amount was substantial under the *Holmes* ratio factor. Supplemental Record 34-41. Petitioner sought review of that decision by the Clackamas County Circuit Court.
January 4, 2010	The Clackamas County Circuit Court upheld the hearings officer's vested rights determination. However, the circuit court determined that expenditures that predated DLCD's second Measure 37 waiver could not be counted leaving only $600 in expenditures that could be counted under *Holmes*, which the court

[2] In *Clackamas Co. v. Holmes*, 265 Or 193, 198–99, 508 P2d 190 (1973), the court identified factors to be considered in determining whether a common law vested right exists, including (1) the ratio of development expenditures to the total project cost; (2) whether the landowner's expenditures were made in good faith; (3) whether the expenditures are related to the completed project or could apply to other uses of the property; and (4) the nature, location, and ultimate cost of the project. *Friends of Yamhill County v. Board of Commissioners*, 237 Or App 149, 151-53, 238 P3d 1016 (2010).

concluded is inadequate under the *Holmes* ratio factor. Petitioners appealed the circuit court decision to the Court of Appeals. Respondents' Brief Appendix A-1 through A-6.

June 8, 2010 — While petitioners' appeal of the Clackamas County Circuit Court vested rights decision was pending at the Court of Appeals, DLCD issued an order on petitioners' separate request for compensation in the form of home sites under Measure 49. That order describes the paintball park as a development under Measure 37 waivers. Pursuant to the section of Measure 49 that applies to rural high value farmland, the order authorizes two residences and two new lots. However, the order provides that the second dwelling is allowed only if the paintball park is removed. Record 94-102.

September 17, 2010 — Petitioners moved to dismiss their appeal of the circuit court vested rights determination, and the Court of Appeals granted the motion and dismissed petitioners' appeal. Respondents' Brief Appendix B-1.

C. Petitioners' Request for Approval of a Private Park

December 1, 2010 — The county directed petitioners to cease operating a paintball park or face a fine of $500 and additional civil penalties of up to $350 per day of violation. Supplemental Record 7-8.

December 7, 2010 — Petitioners advised the county that they intended to seek county approval of the paint ball park as a private park on Low Value Farmland under Clackamas Zoning and Development Ordinance (ZDO) 401.06(C)(1). *See* n 3. Supplemental Record 5.

January 12, 2010 — Petitioners applied for county approval of their paintball park as a private park. Record 81.

March 2, 2011 — The planning director concluded petitioners' property is predominantly High Value Farmland and on that basis denies the application. Record 64-70. Petitioners appealed the planning director's decision to the county hearings officer.

May 16, 2011 — The hearings officer affirmed the planning director's decision, concluding the subject property is predominantly High Value Farmland and rejected

petitioners' other arguments, including their arguments under Measures 37 and 49.

We summarize below petitioners' legal theories for why the hearings officer's decision should be remanded:

1. The subject property is not predominantly High Value Farm Land, as that term is defined by OAR 660-033-0020(8)(a). Therefore the subject property is Low Value Farmland and eligible for approval of a private park under ZDO 401.06(C)(1).

2. Petitioners' Measure 37 waivers authorized continued operation of their paintball park.

3. OAR 660-041-0060 authorizes petitioners to continue operation of their paintball park without the necessity of a vested rights determination.

4. DLCD's Measure 49 Order authorizes petitioners to continue operation of their paintball park.

5. The hearings officer's decision failed to adopt findings explaining how his decision to deny approval for the paintball park is consistent with the Clackamas County Comprehensive Plan and Statewide Planning Goal 3 (Agricultural Lands).

6. The county erroneously recharacterized petitioners' January 12, 2011 application and engaged in improper *ex parte* contacts with petitioners' neighbor.

We now turn to petitioners' assignments of error.

FIRST ASSIGNMENT OF ERROR

ZDO 401.06(C)(1) authorizes "[p]rivate parks on Low Value Farmland" in the county's EFU zone.[3] It is undisputed that petitioners' paintball park qualifies as a private park. However, the parties dispute whether petitioners' land qualifies as Low Value Farmland. As defined by ZDO 401.03(D), Low Value Farmland is "[a]ll land not defined as

[3] ZDO 401.06(C)(1) provides in relevant part:

"The following uses may be allowed on Low Value Farmland subject to Subsection 1305.02.

"1. Private parks * * *."

High Value Farmland in ORS 215.710 and OAR 660-033-0020(8)." Under OAR 660-033-0020(8)(a), land in a tract that is composed predominantly of "prime, unique, Class I or II" soils qualifies as High Value Farmland.[4] Petitioners' 72.38-acre, EFU-zoned parcel qualifies as a "tract."[5] Thus, under ZDO 401.03(D) and OAR 660-033-0020(8)(a), if petitioners' 72.38-acre, EFU-zoned tract is made up of predominantly prime, unique, Class I or Class II soils, petitioner's property qualifies as High Value Farmland. "Predominantly" means a majority or more than half. *Tallman v. Clatsop County*, 47 Or LUBA 240, 247 n 4 (2004). Planning staff found that Class II soil types on the subject property "comprise 55.94 acres of the 72.38 acre parcel or seventy-seven point three percent (77.3%) of the subject property." Record 68. The hearings officer agreed with staff and found that petitioners' parcel is predominantly Class II soils and, for that reason, qualifies as High Value Farmland, making petitioners' EFU-zoned parcel ineligible for approval of a private park under ZDO 401.06(C)(1). In their first assignment of error, petitioners assign error to that finding.

We do not understand petitioners to challenge the hearings officer's finding that the soils on the subject property are predominantly Class II. Petitioners first argue that under OAR 660-033-0020(8)(a), for soils to qualify as High Value Farmland, it is not sufficient to find that the predominant soils are Class I or II; they must also be found to be both prime and unique. Petitioners argue, based on evidence they submitted below, that the soils on their

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[4] OAR 660-033-0020(8)(a) provides:

> "'High-Value Farmland' means land in a tract composed predominantly of soils that are:
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> "(A) Irrigated and classified prime, unique, Class I or II; or
>
> "(B) Not irrigated and classified prime, unique, Class I or II."

ORS 215.710 sets out an identical definition of High Value Farmland.

[5] As defined by OAR 660-033-0020(13), a tract is "one or more contiguous lots or parcels under the same ownership."

property do not qualify as prime and unique, and therefore their property does not qualify as High Value Farmland.

As the county points out, petitioners' argument misreads OAR 660-033-0020(8)(a). The definitions of prime and unique farmland are mutually exclusive, so no soils could qualify as both prime and unique. 7 CFR 657.5(a) and (b). The only plausible reading of OAR 660-033-0020(8)(a) is that a tract qualifies as High Value Farmland if its predominant soil types qualify as prime, or unique, or Class I or Class II soils.[6] Finally, the county points out that the three Class II soils that the county relied on in this matter happen to also qualify as prime soils, notwithstanding petitioners' evidence to the contrary. Record 149, 151, 152.

Petitioners also argue that the soils on the property should not be considered Class II soils, within the meaning of OAR 660-033-0020(8)(a), because the property's Class II soils are within a subclass "w" of Class II soils that is applied where "water in or on the soil interferes with plant growth or cultivation * * *." Petition for Review 13. Viewed in context with OAR 660-033-0020(8)(c), that interpretation is also erroneous. OAR 660-033-0020(8)(a) makes all prime, unique, Class I or Class II soils, including all subclassifications of those four soils, High Value Farmland. It was not necessary to specifically list subclassifications of Class II soils, because by listing Class II soils without qualification or limitation, OAR 660-033-0020(8)(a) includes all Class II soil subclassifications within the definition of High Value Farmland. If there could be any question on this point, that question is dispelled by reference to OAR 660-033-0020(8)(c). OAR 660-033-0020(8)(c) adds to the prime, unique, Class I and Class II soils that OAR 660-033-0020(8)(a) defines as High Value Farmland. In the Willamette Valley, under OAR 660-033-0020(8)(c) Class III and IV soils are defined as High Value Farmland, but only certain subclassifications of Class

[6] Although slightly less clear, a tract would also qualify as High Value Farmland if it was made up predominantly of a combination of prime, unique, Class I and Class II soils, even if none of those four classifications of soil individually made up more than one half of the tract, so long as the total of those four classifications of soil predominate.

III and IV soils, including certain specifically identified "Subclassification IIIw" and "Subclassification IVw soils." That makes it clear, to the extent there could be any doubt, that OAR 660-033-0020(8)(a) defines all Class II soils as High Value Farmland. We reject petitioners' argument to the contrary.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In their second assignment of error petitioners argue that the hearings officer erroneously found that the county's Measure 37 waiver and DLCD's second Measure 37 waiver, which had the effect of waiving the limitation in county and state law that private parks on EFU-zoned land must not be sited on High Value Farmland, became legally ineffective after Measure 49 was adopted and took effect.

Under Measure 49, Measure 37 claimants who previously received Measure 37 waivers were given new forms of just compensation for reductions in their property values. For Measure 37 claimants with property located outside urban growth boundaries, Measure 49 provided two new types of compensation in place of their Measure 37 waiver. Or Laws 2007, ch 424, sec 5.[7]

[7] Oregon Laws 2007, chapter 424, section 5 provides:

> "A claimant that filed a claim under ORS 197.352 on or before the date of adjournment sine die of the 2007 regular session of the Seventy-fourth Legislative Assembly is entitled to just compensation as provided in:
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> "(1) Section 6 or 7 of [Measure 49], at the claimant's election, if the property described in the claim is located entirely outside any urban growth boundary and entirely outside the boundaries of any city;
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> "(2) Section 9 of [Measure 49] if the property described in the claim is located, in whole or in part, within an urban growth boundary; or
>
> "(3) A [Measure 37 waiver] issued before the effective date of this 2007 Act to the extent that the claimant's use of the property complies with the [Measure 37 waiver] and the claimant has a common law vested right on [December 6, 2007] to complete and continue the use described in the [Measure 37 waiver]."

The first form of compensation under Measure 49 is approval of a number of dwellings, depending in part on whether the property that was the subject of the Measure 37 waiver qualified as High Value Farmland. Under section 6 of Measure 49, the holder of a Measure 37 waiver could seek approval of up to three dwellings, if the property for which the Measure 37 waiver was granted qualifies as High Value Farmland. Or Laws 2007, ch 424, sec 6. If the rural property for which the Measure 37 waiver was granted does not qualify as High Value Farmland, up to ten dwellings could be authorized.

The second form of compensation for holders of Measure 37 waivers is set out in section 5(3) of Measure 49. *See* n 7. Under section 5(3) of Measure 49, the holder of the Measure 37 waiver retained a right to the use authorized by the Measure 37 waiver, but only if "claimant's use of the property complies with the [Measure 37 waiver] and the claimant has a common law vested right on [December 6, 2007] to complete and continue the use described in the [Measure 37 waiver]." In describing the interaction of Measure 37 waivers and the new forms of compensation provided by Measure 49, the Oregon Supreme Court explained that with the exception of Measure 37 claimants who can demonstrate that they have a vested right to the use authorized by their Measure 37 waiver, Measure 37 waivers were extinguished by Measure 49 and retained no continuing viability:

> "An examination of the text and context of Measure 49 conveys a clear intent to extinguish and replace the benefits and procedures that Measure 37 granted to landowners. [S]ection 5 of Measure 49, * * * provides that claimants who filed 'claim[s]' under ORS 197.352 before Measure 49 became effective (*i.e.*, Measure 37 claimants), are entitled to 'just compensation' as provided in designated provisions of Measure 49. * * *
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> "* * * * *
>
> "In the end, we hold only that plaintiffs' contention that Measure 49 does not affect the rights of persons who already have obtained Measure 37 waivers is incorrect. In fact, Measure 49 by its terms deprives Measure 37 waivers—and *all* orders disposing of Measure 37 claims—of any continuing viability, with a

single exception that does not apply to plaintiffs' claim. * * *." *Corey v. DLCD*, 344 Or 457, 465-67, 184 P3d 1109 (2008).[8]

Petitioners sought a vested rights determination under section 5(3) of Measure 49, but were unsuccessful. Petitioners also sought a remedy under section 6 of Measure 49 and were granted permission to construct two additional residences on their property pursuant to Section 6 of Measure 49. Petitioners therefore have been awarded just compensation under Measure 49. Petitioners' argument that, despite their successful and unsuccessful efforts to receive just compensation under Measure 49, their Measure 37 waivers that permitted their paintball park on High Value Farmland survived Measure 49 and continue to authorize their paintball park on High Value Farmland is simply inconsistent with the text of Measure 49 and the court's reasoning in *Corey*.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

With one exception, petitioners' third assignment of error largely duplicates their second assignment of error and argues that the hearings officer erroneously found that Measure 49 extinguished their rights under their Measure 37 waiver. We reject the third assignment of error for the same reason we reject the second assignment of error.

The only new argument that petitioners add in their third assignment of error appears at pages 21 and 22 of the petition for review. We understand petitioners to argue that under OAR 660-041-0060 they were entitled to continue to use the paintball park that existed on December 6, 2007, without having to demonstrate that they have a common law vested right to do so under section 5(3) of Measure 49.

[8] The single exception referenced in the last sentence of the quoted text is a reference to the option under section 5(3) to retain a right to the use authorized by a Measure 37 waiver if the Measure 37 claimant can demonstrate that he or she has a common law vested right to complete and continue the use authorized by the Measure 37 waiver.

OAR chapter 660, division 41 was adopted in part to implement Measure 49. OAR 660-041-0000(1). OAR 660-041-0060 provides as follows:

> "Any authorization for a Claimant to use Measure 37 Claim Property without application of a DLCD Regulation provided by a DLCD Measure 37 Waiver expired on December 6, 2007, as did the effect of any order of DLCD denying a Claim. *A Claimant may continue an existing use of Measure 37 Claim Property that was authorized under ORS 197.352 (2005).* A Claimant may complete a use of Measure 37 Claim Property that was begun prior to December 6, 2007, only if the Claimant had a common law vested right to complete and continue that use on December 6, 2007, and the use complies with the terms of any applicable DLCD Measure 37 Waiver." (Italics and underlining added.)

Petitioners read the italicized and underlined sentences in OAR 660-041-0060 to distinguish between existing (i.e., completed) uses under Measure 37 waivers and uses under Measure 37 waivers that were not yet compete on December 6, 2007. Petitioners contend that under OAR 660-041-0060 a vested right determination is required only for Measure 37 claim uses that are not complete. We understand petitioners to allege the heaings officer's finding that they were not allowed to continue the paintball park that existed on their property on December 6, 2007, without first demonstrating they had a vested right to do so, represents a misconstruction of OAR 660-041-0060.

Petitioners' argument is an interesting one, but it suffers from a number of problems. The first problem is that the record in this appeal does not establish that petitioners' paintball park was completed on or before December 6, 2007. Certainly their August 25, 2008 decision to seek a vested right determination from the county and circuit court to complete and continue their use suggests that construction of the paintball park was not complete on December 6, 2007.

Even if the paintball park was complete on December 6, 2007 and OAR 660-041-0060 can be read to distinguish between existing uses and not yet completed uses that were authorized by a Measure 37 waiver, the rule would appear to be inconsistent with section 5(3) of Measure 49, which does not seem to make such a distinction. The statute would

control if the rule is inconsistent. It is worth noting that although OAR 660-041-0060 can be read to suggest that existing uses and not-yet-completed uses are to be treated differently, we are aware of no other reason to suspect that the legislature did not intend all Measure 37 claimants to show that they have a common law vested right to continue a use that was authorized by a Measure 37 waiver. Under the *Holmes* factors, a Measure 37 claimant who constructed a use in good faith under a Measure 37 waiver would likely have no problem demonstrating that a use that was fully completed on December 6, 2007 satisfies the *Holmes* factors, unless the majority of expenditures were made without required permits and in contravention of the land use laws that were in effect when the expenditures were made, which the county and circuit court found to be the case here. In that circumstance, under *Holmes*, those expenditures that were in violation of land use laws when made could not be considered in making a vested rights determination.

Finally, and perhaps most importantly, petitioners have changed their legal theories a number of times in this matter. As far as we can tell, petitioners did not present their OAR 660-041-0060 argument to the county planning director or the hearings officer. That argument appears to be presented for the very first time in the petition for review, and while we believe it is presented and developed sufficiently for review, the county did not recognize the argument and does not respond to it in its brief. Petitioners (1) have not established that their paintball park was completed on December 6, 2007, (2) make no attempt to explain how their interpretation of OAR 660-041-0060 is consistent with or represents a permissible refinement of Section 5(3) of Measure 49, and (3) failed to raise the OAR 660-041-0060 issue to the county before its decision was issued. For all of those reasons, we reject petitioners' OAR 660-041-0060 argument.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

The issue presented under the fourth assignment of error is whether DLCD's June 8, 2010 Measure 49 order authorizes petitioners to retain the paintball park on their property. DLCD's Measure 49 order includes the following discussion regarding the paintball park;

"II. COMMENTS ON THE PRELIMINARY EVALUATION

> "The department issued its Preliminary Evaluation for this claim on March 25, 2020. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. Comments received have been taken into account by the department in the issuance of this Final Order and Home Site Authorization. The claimants submitted a comment regarding their non-residential use of the claim property. *Measure 49 does not authorize the department to authorize any non-residential uses of claim property*.

"**III. CONCLUSION**

> "* * * * *
>
> "Based on the analysis above, claimant Curtis Gottman qualifies for up to three home sites. However, the number of lots, parcels or dwellings that a claimant may establish pursuant to a home site authorization is reduced by the number of lots, parcels or dwellings currently in existence on the Measure 37 claim property and any contiguous property under the same ownership according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49. <u>However, claimant Curtis Gottman has a recreational paintball park established on the Measure 37 claim property. Therefore, to establish the maximum number of home sites, the claimant must convert the paintball park to a home site under Measure 49</u>.
>
> "Based on the documentation provided by the claimants and information from Clackamas County, the Measure 37 claim property includes one lot or parcel, one dwelling and one recreational use. There is not contiguous property under the same ownership. <u>Therefore, the three home site approvals claimant Curtis Gottman qualifies for under section 6 of Measure 49 will authorize the claimant to establish up to two additional lots or parcels and two additional dwellings on the Measure 37 claim property. However, the claimant may only establish the second additional dwelling if he converts the paintball park to a home site</u>." Record 98-99. (Italics and underlining added).

In addressing whether the DLCD Measure 49 Order authorizes petitioners to retain the paintball park, the hearings officer adopted the following findings:

> "On page 5 of the order, DLCD noted that the applicants had made a 'comment regarding their non-residential use of the claim property.' The department's specific response was, 'Measure 49 does not authorize the department to authorize any non-residential uses of the claim property.' It is clear that DLCD did not take a position on the paintball facility itself. The paintball park was noted as an existing condition of the property, nothing more. Given that Measure 49, Section 6 can only grant relief in the form of residential uses, it would be inconsistent with the scope and authority of that section to interpret it as the applicants propose." Record 6.

Petitioners fault the hearings officer for focusing on the italicized sentence quoted above and ignoring the hearings officer's conclusion itself. Petitioners argue the underlined sentences in the conclusion recognize petitioners' paintball park and give petitioner Curtis Gottman the right "to choose to stop using the subject property for a recreational park and build two additional home sites, or choose to continue using the subject property for a private park and build only one additional home site." Petition for Review 24.

The county responds only generally that Measure 49 remedies apply in place of Measure 37 remedies and petitioners could only have a right to retain the paintball park if they have a common law vested right to do so under Section 5(3) of Measure 49. That answer is not directly responsive to petitioners' argument under the fourth assignment of error. Nevertheless for the reasons explained below, we do not agree with petitioner's understanding of the conclusion in DLCD's June 8, 2010 Measure 49 Order.

We generally agree with the hearings officer that DLCD's Measure 49 Order is correctly understood first to recognize that a paintball park existed on the property in some form when the Measure 49 Order was issued, second to take the position that DLCD is not authorized under Measure 49 to authorize non-residential uses such as the paintball park, third to imply that one house can be constructed while the paintball park remains, and fourth to take the position that construction of a second dwelling will require that the paintball park site be converted to a home site.

Regarding the first point, *recognizing* the existence of a paintball park is not the same as *authorizing* a paintball park. As DLCD expressly stated in the second described point

above, DLCD does not have authority under Measure 49 to authorize a non-residential use. At the time DLCD issued its Measure 49 Order, both the hearings officer and circuit court had decided that petitioners did not have a vested right to continue the paintball park, but petitioners' appeal of the circuit court decision remained pending at the Court of Appeals until that appeal was dismissed on September 17, 2010, over three months after DLCD issued its Measure 49 Order. We have no reason to believe DLCD was unaware of the pending appeal of the circuit court decision, and DLCD may have simply intended to acknowledge the uncertainty that existed at the time DLCD's Measure 49 Order was issued concerning petitioners' right to continue use of the paintball park.

Turning to the third and fourth points above, DLCD's order can be read to imply that petitioners can develop one home site, without removing the paintball park, and may develop a second home site, provided the paintball park is converted to a home site at that time. We can understand how petitioners might draw an inference from that part of the order that DLCD intended to leave petitioners the choice of whether to keep the paintball park and develop one home site or give up the paintball park and develop two home sites. But that inference does not support the additional inference that petitioners draw from the third and fourth points—that DLCD intended its Measure 49 Order independently to *authorize* the paintball park and one home site as an option. DLCD expressly stated that it was powerless to authorize non-residential uses under Measure 49 (second point above). The only possible source of legal authorization for the paintball park when DLCD issued its Measure 49 Order on June 8, 2010 was a vested rights determination under Section 5(3) of Measure 49. Again, although the circuit court had determined that petitioners had no such right on January 4, 2010, petitioners' pending appeal of that circuit court decision left the issue of petitioners' vested right to continue the paintball park uncertain.

We note that DLCD's apparent position in its Measure 49 Order that petitioners could be permitted to develop one home site without first removing the paintball park and need

only remove the paintball park in the event a second home site was developed was likely inconsistent with Measure 49. As we have already explained, the home site remedy provided by Section (6) of Measure 49 and common law vested right remedy under Section 5(3) of Measure 49 are alternative and exclusive. But even if DLCD was incorrect in authorizing development of the first home site without requiring that the paintball park be removed, that does not mean DLCD's Measure 49 Order independently authorized the paintball park. Whether DLCD took the approach that it did due to the uncertainty of petitioners' pending effort to secure a vested right determination to retain the paintball park or for some other reason is not important. What is important for purposes of this appeal is that there is absolutely no reason to believe DLCD intended that its Measure 49 Order to independently authorize petitioners' paintball park, and there is a good reason to believe it did not. As we have already explained, DLCD's Measure 49 order expressly recognized that DLCD lacked authority to approve non-residential uses under Measure 49.

The fourth assignment of error is denied.

FIFTH AND SIXTH ASSIGNMENTS OF ERROR

In their fifth assignment of error petitioners cite a goal and two policies under the Open Space section of the Clackamas County Comprehensive Plan and text, and a goal and a policy under the Parks and Recreation section of the comprehensive plan. With regard to these comprehensive plan provisions, petitioners argue "the Findings in the 2011 Decision make no comment on how closing this park will accomplish these Goals." Petition for Review 27. In their sixth assignment of error petitioners argue that because the county directive that petitioners cease operation of the paintball park states that petitioners are to [r]emove all improvements" and "any other item associated with the operation of the commercial paintball park," they will be required to remove a large number of trees on the property that were planted to enhance the paintball park, which petitioners contend is inconsistent with Statewide Planning Goal 3 (Agricultural Lands) and Measure 49.

Petitioners argue "[t]here is no evidence or comment in the Findings that addresses how closing the park and removing the trees accomplishes the intent of Measure 49 or Goal 3." Petition for Review 28.

There are a number of problems with petitioners' fifth and sixth assignments of error. First, as respondent points out, the issues raised in those assignments of error were not raised below and are raised for the first time in the petition for review. The hearing below was conducted pursuant to ORS 197.763. LUBA's scope of review concerning decisions that are rendered pursuant to ORS 197.763 is limited to issues that were raised below. ORS 197.835(3).[9] Because the issues raised in the fifth and sixth assignments of error were not raised below, they are beyond our scope of review.

Even if the issues presented in the fifth and sixth assignments of error were not waived, the county's comprehensive plan and land use regulations have long been acknowledged. The statewide planning goals normally do not apply directly to a permit decisions governed by an acknowledged comprehensive plan and land use regulations, such as the decision that is before us in this appeal. *Byrd v. Stringer*, 295 Or 311, 316-17, 666 P2d 1332 (1983). In their sixth assignments of error, petitioners offer no legal theory that would require that the county apply Goal 3 directly. Similarly, petitioners offer no legal theory why the comprehensive plan language, goal and policies they cite in their fifth assignment of error apply directly in this matter. We agree with respondent that those policies are written as general directives for planning rather than as criteria that must be applied to individual permit decisions. *Bennett v. City of Dallas*, 96 Or App 645, 647-49, 773 P2d 1340 (1989); *Angel v. City of Portland*, 21 Or LUBA 1, 13, (1991).

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[9] ORS 197.835(3) imposes the following limitation on the issues that may be considered by LUBA in reviewing a quasi-judicial land use decision:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

The fifth and sixth assignments of error are denied.

SEVENTH ASSIGNMENT OF ERROR

In their seventh assignment of error, petitioners claim their January 12, 2011 application was for planning director review for a private recreational park. Record 81. Petitioners contend it was error for the county to change that application into a "Land Use 'Interpretation.'" Petition for Review 28. Among the legal theories petitioners were asserting in support of their application was that their paintball park qualifies as a "[p]rivate park[] on Low Value Farmland" under ZDO 401.06(C)(1). The county's notice of petitioners' application stated that "[t]he applicant is seeking an interpretation that the property is Low Value Farmland * * *." Record 78. To prevail in their request for approval of their paintball park as a private park under ZDO 401.06(C)(1), petitioners were required to establish that their property is Low Value Farmland. We fail to see how the county's characterization of petitioners' request as an "interpretation" constitutes error.

Finally, petitioners also argue that planning staff had *ex parte* contacts with a neighbor who opposes the paintball park and that those contacts establish that the county is biased against petitioners. The short answer to this argument is that ZDO 1301.01(C)(4) and (5) prohibit *ex parte* contacts between parties and hearings officers, planning commissioners and county commissioners and include procedures for allowing an opportunity to rebut any *ex parte* contacts that might occur. There is no prohibition that we are aware of against planning staff communications with the parties to a quasi-judicial land use proceeding. Such communications are not *ex parte* contacts. *McKenzie v. Multnomah County*, 27 Or LUBA 523, 532 (1994).

The seventh assignment of error is denied.

The county's decision is affirmed.